Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

No. 92-1848

(3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WHITWORTH BROTHERS STORAGE COMPANY,
Petitioner,
v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A. Whether ERISA provides federal courts with jurisdiction to consider a complaint regarding a post-ERISA action by a plan administrator which is based upon some pre-ERISA conduct?

B. Whether federal common law created pursuant to ERISA provides a cause of action for an employer to sue to recover mistaken contributions paid prior to ERISA where a plan administrator has made a post-ERISA denial of a refund of such contributions?

C. Whether (if such cause of action is provided) the remedy should be limited by a refund limitation contained in the documents governing the plan?

II. Whether the appellate court correctly determined that interest is not available as a remedy on any refund of post-ERISA contributions to Petitioner?

III. Whether the appellate court correctly affirmed a summary judgment that Petitioner's claim for a refund of post-ERISA contributions made on behalf of Ernest Whitworth should be dismissed for failure to exhaust administrative remedies, notwithstanding Petitioner's claim of futility?

IV. A. Whether the appellate court's reference to three background facts was proper?

B. (If not) whether the reference prejudiced or affected the substantial rights of Petitioner?

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[1] Although the caption accurately reflects all parties to this lawsuit, for point of clarification the following Central States Trustees were parties to the proceeding in the Court of Appeals and join in this response: Howard J. McDougall, Robert J. Baker, R.V. Pulliam, Sr., Arthur H. Bunte, Jr., R. Jerry Cook, and Harold D. Leu. Marion M. Winstead and Robert C. Sansone were parties to the proceeding below, but are no longer Central States Trustees. Ray Cash and Joe Orrie are recently appointed Central States Trustees; they join in this response. Ronald J. Kubalanza, the Central States Executive Director, was a party to the proceeding below and joins in this response.

STATUTES

The statutes involved in this case are part of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* Relevant excerpts from the statute are reproduced in the Appendix, *infra*, pp. 1a-3a, as follows:

29 U.S.C. § 1103(c)(1)
29 U.S.C. § 1103(c)(2)(A)(ii)
29 U.S.C. § 1144(a)
29 U.S.C. § 1144(b)(1)
29 U.S.C. § 1144(b)(2)(A)
29 U.S.C. § 1144(b)(2)(B)
29 U.S.C. § 1144(c)

STATEMENT OF THE CASE

1. *The Parties.*

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund")[2] is a multiemployer pension benefit plan as defined in Section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") (as amended), 29 U.S.C. § 1002(2)(A).[3] A multiemployer plan is one to which more than one employer is required to make contributions pursuant to collective bargaining agreements with one or more local unions. 29 U.S.C. § 1002(37)(A). All contributions and earnings thereon are used to provide pension benefits for participants and beneficiaries and to defray reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). Central States was established pursuant to a trust agreement that provides that Central States shall be administered by a Board of Trustees. The Board of Trustees consists of four trustees appointed by

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[2] As Central States is a multiemployer benefit plan there are no parent or subsidiary corporations.

[3] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. § 1001 *et seq.*

labor organizations of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") and four trustees appointed by employer associations in accordance with the Taft-Hartley Act. The trust agreement grants the Trustees the power to create a pension plan document and to amend the pension plan document and the trust agreement. (*See* R. 36: Priede Affidavit, Exhibit A at Article VII, Sections 1 and 3, Artitcle X.)

Whitworth Brothers Storage Company ("Whitworth Brothers") was an employer which participated in the Pension Fund and made contributions to the Pension Fund pursuant to the terms of collective bargaining agreements between itself and a local union affiliated with the IBT.

2. *Background Facts and Proceedings below.*

Many of the facts pertinent to this response are accurately stated in the opinion of the Sixth Circuit. *See* Petitioner's Appendix at pp. 2a-65a.[4] Facts appearing in the record below, but not in the Sixth Circuit's opinion, are parenthetically cited as "(R. —)".

A. Whitworth Brothers' Refund Claim, and the Pension Fund Trust Agreement Provision Related to Refunds.

This case concerns the effect of a provision in the Pension Fund's trust agreement which requires employers who make refund claims for mistaken contribution payments to do so within one year of the time from which the mistaken payment was made.

Whitworth Brothers began participating in the Central States Pension Fund in June 1964. (R. 36: Priede Affidavit, ¶ 6.) It submitted contributions on behalf of William Whitworth from June 1964 through March 1980,

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[4] Citations to Petitioner's Appendix will hereinafter be made as "Pet. App. at p. ——".

and on behalf of Ernest Whitworth from June 1964 through June 1981. (R. 36: Priede Affidavit, ¶ 6.) It also submitted contributions on behalf of other individuals. On November 10, 1980, Whitworth Brothers made a demand to Central States for a refund of certain contributions mistakenly made on behalf of William Whitworth over a period of 15 years. At the time this demand was made, the provision of the Central States Pension Fund Trust Agreement which governed employer refunds, Article XIV, Section 1, provided:

> In no event shall Employers, directly or indirectly, receive any refund on contributions made by them to the Trust except in case of bona fide mistake, and as to which contributions are returned within *one year* after payment of the contributions . . .

(*See* R. 36: Priede Affidavit, Exhibit A.)

This Trust Agreement provision was based on ERISA's refund rule, 29 U.S.C. § 1103(c)(2)(A), which, prior to September 26, 1980, permitted a pension plan to return only contributions made by an employer under a mistake of fact within one year after payment of the contributions:

> In the case of a contribution, which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.

Paragraph (1) provided that "the assets of a plan shall never inure to the benefit of any employer." Congress amended this provision on September 26, 1980 to read, in pertinent part, as follows:

> (2)(A) In the case of a contribution . . .
>
> (ii) . . . made by an employer to a multiemployer plan by a mistake of fact or law . . ., paragraph (1) shall not prohibit the return of such contribution or payment to the employer within six months after

> the plan administrator determines that the contribution was made by such a mistake.

In December 1980, the Central States Trustees amended the refund rule found in Article XIV, Section 1 of the Trust Agreement, retroactive to September 26, 1980, to liberalize somewhat the refund provision in the wake of the ERISA amendment which made such liberalization possible. The amended trust agreement, in relevant part, provides:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except a refund of contributions made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees if application therefor is received within one year after payment of the contributions.

(R. 36: Priede Affidavit, Exhibit B.)

In adopting this change the Trustees recognized:

> (a) the need to deter, and to protect the Fund from, employer payment of contributions on behalf of employees or other persons *ineligible* to become participants and beneficiaries of the Fund, by application of reasonable standards for entitlement to employer contribution refunds; and (b) the need to deter, and to protect the Fund from, unjustified and detrimental delay by employers in seeking employer contribution refunds, by application of *reasonable time limits* upon request for such refunds . . ."

(R. 36: Priede Affidavit, Exhibit B [emphasis in original].)

B. The Proceedings Below.

On November 10, 1980, Whitworth Brothers made its demand for a refund. The request for a refund of pension contributions made on William Whitworth's behalf

from June 1964 through November 10, 1979 was denied, but a refund was approved in accordance with Article XIV, Section 1 of the Trust Agreement for the period of November 11, 1979 (one year prior to the request) through March 1, 1980 (the last day of contributions made on William Whitworth's behalf). Prior to filing a lawsuit, Whitworth Brothers did not seek a refund of any contributions made on behalf of Ernest Whitworth.

In September 1983, Whitworth Brothers sued Central States, in a three-count complaint seeking a refund of contributions made to the Central States Pension Fund on behalf of William and Ernest Whitworth. Specifically, Count I of the complaint alleged a right, pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth Brothers to the Pension Fund on behalf of William Whitworth and Ernest Whitworth *after* the effective date of ERISA (i.e., after January 1, 1975); Count II alleged a pendent state-law claim for restitution of Whitworth Brothers' contributions for William Whitworth and Ernest Whitworth *prior* to the effective date of ERISA (i.e., prior to January 1, 1975); and Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth Brothers is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover unpaid contributions. Jurisdiction was claimed pursuant to ERISA and 28 U.S.C. § 1331.

In January 1985, the district court entered an order dismissing the ERISA counts of the Complaint for lack of jurisdiction over the subject matter because ERISA did not specifically authorize employers to file ERISA actions, and dismissing the pendent state law claim pursuant to its discretionary authority.

Whitworth Brothers appealed, and the United States Court of Appeals for the Sixth Circuit reversed and remanded. *Whitworth Brothers Storage Co. v. Central*

States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986) (*"Whitworth I"*). In its opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on: (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The Sixth Circuit answered the first two of these questions in the negative, holding that "section 502 [29 U.S.C. § 1132] is an exclusive grant of jurisdiction, that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has no "implied right of action pursuant to section 403 [29 U.S.C. § 1103]." *Id.* at 228, 233. However, the Sixth Circuit characterized Whitworth Brothers' restitution claim as a "contract claim", found that such a claim is governed by federal common law and held that Whitworth Brothers' action for restitution "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236. The Sixth Circuit held the district court erred in concluding that it had no jurisdiction over the case. *Id.* at 236. In so holding, however, the Sixth Circuit made it clear that Whitworth Brothers' federal common law claim was expressly limited by the terms of ERISA set out in 29 U.S.C. § 1103(c)(2)(A), and by the terms of the agreement between the parties. *Id.* at 236, n.24 (The Sixth Circuit, as do a number of the other courts of appeals, refers to the written documents governing the plan [the plan document and where applicable, the collective bargaining agreement and trust agreement or declaration of trust] as "agreements," "contracts," or "contractual documents." *See Whitworth I*, 794 F.2d at 236 n.24 ("agreement"); *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986) ("the contract in this case, the Trust

Agreement . . ."). Central States' petition to this Court for a writ of certiorari was denied.[5]

On remand, Central States moved for Summary Judgment. The district court granted Central States' motion as to counts one and two of the complaint, holding that: (1) since the Board of Trustees of Central States acted in accordance with the written trust agreement, the Trustees' decision as to Whitworth Brothers' claim for a refund was not arbitrary or capricious (Count I); and (2) Whitworth Brothers' claim for restitution of contributions paid to Central States prior to January 1, 1975 (when ERISA became effective) was barred by the contract of the parties (the trust agreement) which limited claims for refunds, as described above (Count II). Because of the district court's ruling on counts one and two, there remained no issue of fact on count three; therefore, judgment on count three was for Whitworth Brothers. Whitworth Brothers appealed again.

The Sixth Circuit issued an opinion on January 11, 1993, in which it affirmed in part and reversed in part the judgment of the district court, and remanded for further proceedings; specifically: (1) the district court's denial of a refund for all pre-ERISA contributions made prior to January 1, 1975, was affirmed on the basis of the trust agreement provision in effect during that period; (2) the dismissal of the complaint in regard to post-ERISA contributions made on behalf of Ernest Whitworth after January 1, 1975, was affirmed because he had not requested a refund from the Pension Fund before filing suit; (3) the grant of summary judgment in regard to the denial of a refund of post-ERISA contributions made on behalf of William Whitworth after January 1, 1975, was

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[5] In its petition, Central States asked this Court to resolve the direct conflict between the Sixth Circuit in *Whitworth I* and the Eleventh Circuit in *Dime Coal Company, Inc. v. Combs*, 796 F.2d 394 (11th Cir. 1986), which held that a federal common law cause of action of restitution was not available to employers which made mistaken contributions to employee benefit plans.

reversed and remanded for a hearing on the validity of the trust agreement provision in effect after the 1980 amendment; and (4) the district court's decision that no interest is due on whatever amounts are refunded (pursuant to subparagraph 3 above) was affirmed. Pet. App. at pp. 63a-65a. Whitworth Brothers' petition for Rehearing was denied on February 16, 1993. Pet. App. at pp. 68a-69a.

Whitworth Brothers' petition for a writ of certiorari to this Court was served on Central States on May 19, 1993. On June 7, 1993, this Court allowed Central States until July 19, 1993 to file this response.

SUMMARY OF ARGUMENT

The Petitioner, Whitworth Brothers Storage Company ("Whitworth Brothers") asks this Court to resolve a split in the Circuits concerning the application of 29 U.S.C. § 1144 [6] to cases which involve actions by ERISA plan administrators after ERISA's effective date as well as conduct prior to ERISA's effective date. The Sixth Circuit in this case has upheld the district court's entry of summary judgment against Whitworth Brothers on Count II [7] of its Complaint, a state law claim for restitution.[8]

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[6] ERISA's preemption and choice of law provision. *See Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984) (dissent).

[7] Count One was a claim "for recovery of Plaintiff's contributions to Central States on and after January 1, 1975 (when ERISA became effective) pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii)." Complaint, ¶ 9.

[8] Count II sought "restitution of Plaintiff's contributions to Central States prior to January 1, 1975 (when ERISA became effective)" (Complaint, ¶ 18). This claim was brought pursuant to "pendent jurisdiction" over "State [law] claims [which] derive from a common nucleus of operative facts" (Complaint, ¶ 17).

In doing so, Whitworth Brothers argues, the Sixth Circuit implicitly [9] relied upon the narrow view of the scope of ERISA's preemption provision it had adopted in *Stevens v. Employer-Teamster's Joint Council*, 979 F.2d 444, 451 (6th Cir. 1992) pursuant to which (1) state law would remain in place to provide the rule of decision for cases involving post-ERISA plan administrator actions and pre-ERISA operative facts, and (2) ERISA would therefore provide no jurisdictional basis for such a case.

Central States believes that resolution of the conflict between the narrow view of the scope of ERISA preemption and the broad view is important, and it agrees that this Court should resolve this issue, and indeed it agrees that a broad view of the scope of ERISA preemption is appropriate, but submits that the correct resolution of the "Question Presented" as formulated by Whitworth Brothers actually involves two other issues, including one of much greater ongoing importance:

> Must the written documents governing the plan (in addition to the plan administrator's application of the plan's provisions) withstand judicial scrutiny under a "reasonableness" standard? Specifically, must a trust agreement provision limiting the period for which an employer may recover contributions paid to the plan by mistake be determined to be "arbi-

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[9] In *Whitworth II*, the Sixth Circuit did not expressly address the scope of ERISA's preemption provision. Whitworth Brothers correctly points out that the court treated the issue of the recoverability of pre-ERISA contributions as a state law issue (Whitworth Brothers' Petition, p. 17). Although the court may have done this because Whitworth Brothers' Complaint based its demand for pre-ERISA contributions only on state law, this treatment also corresponds to a narrow view of preemption, which might hold that the operative facts concerning the plaintiff's claim for pre-ERISA contributions (the contributions themselves and the contractual provision governing refunds at that time) were "acts" which occurred prior to January 1, 1975 and to which, therefore, ERISA's preemption provision would not apply.

trary and capricious" and set aside in favor of an equitable rule created by the Court?

This is the issue for which Central States has filed a Cross-Petition for Writ of Certiorari in this case, and the answer to this question should govern the result on both the Count (II) regarding which Whitworth Brothers has petitioned for certiorrari, and the Count (I) regarding which Central States has cross-petitioned. The Whitworth Brothers Petition itself presents this question, in the sense that it does not simply ask this Court to decide whether ERISA (and whatever common law exists under ERISA) applies to a post-ERISA plan administrator decision based in part on pre-ERISA conduct, but rather it asks this Court to confirm that a particular cause of action exists [10] and to decide that the rule of decision for that cause of action should not accept the "contractual provision in effect" (*Whitworth II*, *supra*, Pet. App. at p. 25a) as the limit to the amount of contributions which it could recover under that cause of action:

> "*Does* the recognized federal common law *action for restitution* of an employer's post-ERISA mistaken pension contributions also *extend to pre-ERISA contributions*? In determining that question, . . . should ERISA preemption be used as a basis to deny any remedy [11] of restitution for unjust enrichment under federal or state law?"

Whitworth Brothers' Petition for Certiorari, p. i.

Second, Whitworth Brothers argues that it is entitled to interest on any post-ERISA contributions refunded be-

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[10] This is the other issue which the Whitworth Brothers' "Question Presented" involves: does a federal common law cause of action for restitution exist at all?

[11] The Sixth Circuit's decision did not purport to completely deny Whitworth Brothers any remedy for pre-ERISA contributions; it simply held that Whitworth Brothers' remedy would be limited by the refund provision of the Central States Trust Agreement, at least for pre-ERISA contributions.

cause its federal common law restitution claim is based on principles of equity. No split in the Circuits exists on this issue. Rather, in support of its argument Whitworth Brothers simply cites recent decisions of this Court which it argues to be inconsistent with the Sixth Circuit's decision. *U.S. v. Texas,* —— U.S. ——, 113 S. Ct. 1631, 123 L.Ed.2d 245 (1993) and *Franklin v. Gwinnett County Public Schools,* —— U.S. ——, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Central States submits that these decisions are inapposite.

Third, Whitworth Brothers argues that, under the facts of this case, the Sixth Circuit incorrectly held that the claim for a refund of contributions paid on behalf of Ernest Whitworth should have been dismissed for Whitworth Brothers' failure to exhaust its administrative remedies. Central States submits that the appellate court correctly decided the exhaustion issue and that it does not raise a question of sufficient importance for this Court to review.

Lastly, Whitworth Brothers argues that the appellate court incorrectly relied upon evidence that was not in the record. Central States submits that the appellate court properly referred to certain background facts in writing its decision, and that since suggestion has not been made that the facts were not correct, such reference was harmless in any event. The issue is also not of sufficient importance to justify review by this Court.

ARGUMENT

INTRODUCTION

In the interest of clarity, it should be noted that Whitworth Brothers' first "Question Presented" consists of three issues. Whitworth Brothers devotes most of its brief to the split among the Circuits on the meaning of ERISA's pre-emption provision as applied to claims involving a post-ERISA decision of a plan administrator which is based at least in part on pre-ERISA conduct. This issue has indeed divided the Circuits and is an important issue, but the first "Question Presented" in the Whitworth Brothers' Petition actually includes two other issues, one of which is of even greater importance. For analytical purposes, these questions should be distinguished and addressed separately.

Whitworth Brothers has formulated its first Question Presented as follows:

> Does the recognized federal common law action for restitution of an employer's post-ERISA mistaken pension contribution also extend to such pre-ERISA contributions? In determining that question, in the face of a conflict among seven circuit courts and this Court's holding in *Franklin v. Gwinnett Country Public Schools*, 112 S.Ct. 1028 (1992), should ERISA pre-emption be used as a basis to deny any remedy of restitution for unjust enrichment under federal or state law?

The issue which Whitworth Brothers Petition discusses at greatest length is whether ERISA (and federal common law created pursuant to ERISA) applies [12] to a case

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[12] The Courts have discovered three separate inquiries in the issue of whether ERISA applies. First, does ERISA provide federal courts with jurisdiction to hear such a case? Second, does ERISA pre-empt state law which might otherwise provide the rule of decision for such a case? Third, what rule of decision is required

involving a post-ERISA plan administrator decision based upon at least some pre-ERISA conduct. This is the first issue raised by Whitworth Brothers' "Question Presented."

The "Question Presented" quoted above, however, asks this Court to declare, not just that ERISA applies, but that a particular federal common law cause of action developed by some of the Circuits (an employer action for restitution) applies to such a case. The question of whether this particular cause of action should be applied in such a case involves a second issue: whether such a cause of action is appropriate at all, an issue upon which the Circuits are also divided. Certiorari was requested on this issue by Central States and denied by this Court earlier in this case. *Central States v. Whitworth Brothers, cert. denied*, 479 U.S. 1009, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986).

If the Court decides that ERISA applies to post-ERISA denials of pre-ERISA contributions, and that a federal common law cause of action exists to sue after a request for a refund of such contributions is denied, the third issue raised by Petitioner's "Question Presented" will arise: is the remedy available under such a cause of action limited by the written documents governing the plan? [13]

The last issue is the most important of the issues involved in the "Question Presented" as framed by Whitworth Brothers, although the Courts of Appeal are split as to all three of these issues. Because the issue of whether a federal common law cause of action to sue

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by ERISA (in the event it preempts state law): federal common law created independent of state law, or previously applicable state law incorporated into federal common law?

[13] Whitworth Brothers argues that such a limitation amounts to no remedy at all (Petition, p. 17). In fact, this is not correct: a remedy is provided; it is simply limited to enforcing the contractual provisions which govern the question.

for a refund of contributions paid by mistake has been the subject of an earlier petition for certiorari, it will not be separately discussed here, except to note the conflict among the Circuits on the issue.[14] Because the last issue is not presented with the clarity it deserves in the Whitworth certiorari petition, and because the issue also affects the Sixth Circuit's decision on Count I (for which Whitworth Brothers did not seek certiorari) Central States has filed a separate Cross-Petition as to that issue. Therefore, only a brief reference will be made to that issue in this brief, but the Court is requested to review the Cross-Petition for discussion of that issue. Thus, the only issue from the "Question Presented" which will be specifically addressed in this brief is the first issue.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER ERISA (OR FEDERAL COMMON LAW CREATED PURSUANT TO ERISA) PROVIDES JURISDICTION AND A CAUSE OF ACTION (AND IF SO, WHAT THE RULE OF DECISION SHOULD BE) IN CASES INVOLVING BOTH A PLAN ADMINISTRATOR'S POST-ERISA ACTION AND SOME PRE-ERISA CONDUCT.

A. Courts of Appeals Are Split on Whether ERISA Provides Jurisdiction and a Cause of Action (and If So, What the Rule of Decision Should Be) In Cases Involving Both a Post-ERISA Plan Administrator Action and Some Pre-ERISA Conduct.

Whitworth Brothers has correctly quoted the Sixth Circuit's description of the split which has arisen over the meaning of the exception to ERISA's preemption provision which was created for pre-ERISA claims and conduct. 29 U.S.C. § 1144(b)(1). Petition at pp. 14-15.

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[14] *See, e.g., Dime Coal Company, Inc. v. Combs*, 796 F.2d 394 (11th Cir. 1986) (no federal common law cause of action exists) and *Whitworth I*, 794 F.2d 221 (6th Cir. 1986) (federal common law cause of action exists).

In cases involving a post-ERISA plan administrator action (such as a denial of benefits or, in this case, a denial of a refund for mistaken contributions) which is based in part on some pre-ERISA conduct, the courts are divided as to whether ERISA provides federal court jurisdiction to review a complaint regarding such plan administrator action and, if so, what rule of decision should be applied. As the Sixth Circuit noted, the Third, Fourth and Fifth Circuits have taken a broad view of ERISA pre-emption and jurisdiction, and the First, Second, and Ninth Circuits have taken a narrow view. *Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444, 451 (6th Cir. 1992). The Sixth Circuit has joined the narrow view, concluding (1) that "ERISA jurisdiction does not lie if a pension plan's denial of benefits was based on pre-1975 acts or omissions," *Id.* at 453, and (2) that ERISA preemption of state law does not extend to such cases. *Id.* at 453. In so holding, the Sixth Circuit rejected the specific conclusion of the Third and Fourth Circuits that "the act of denying a pension post-ERISA will invariably involve a 'contemporaneous construction of the plan's provision' " to which ERISA applies. *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989), *quoting Tanzillo v. Local Union 617*, 769 F.2d 140, 144 (3rd Cir. 1985). *Stevens*, 979 F.2d at 451-452.

This view has the effect, *inter alia*, of denying a federal forum to a participant who has had a pension denied after the effective date of ERISA, despite ERISA's specific provision that "a civil action may be brought . . . by a participant . . . to recover benefits due him under the terms of his plan. . . ." 29 U.S.C. § 1132(a)(1)(B).

B. This Case Presents an Opportunity for This Court To Resolve the Split.

Although the Sixth Circuit's detailed discussion of the split appears in the *Stevens* case quoted above, Petitioner

argues that this case presents an appropriate opportunity for this Court to resolve the split.

While the Sixth Circuit did not address the split in this case,[15] the facts of this case certainly present an example of a post-ERISA plan administrator decision based in part on pre-ERISA conduct. The denial of Whitworth Brothers' refund request occurred in July 1981, long after the effective date of ERISA. *Cf.* 29 U.S.C. §§ 1114, 1144. The contributions for which the refund was sought pursuant to Count II of the Complaint, on the other hand, were all made prior to the effective date of ERISA. *Id.*; Complaint, Count II.

C. This Split Presents Important Questions for Resolution by This Court.

ERISA plans will continue to be presented with benefit claims based in part on pre-ERISA conduct, particularly pension claims which, although decided post-ERISA, will often involve conduct which occurred prior to 1975. In addition, as this case demonstrates, plans will continue to be presented with refund requests (often triggered by pension denials) based upon conduct which occurred prior to ERISA. Particularly in view of the importance Congress attached to the need to ensure that benefit plans would be administered in accordance with the governing plan documents so that plans and their participants benefit from the certainty and predictability attached to such writen terms, certiorari should be granted in this case. This case presents the interest plans have in the uniformity ERISA provides in areas other than benefit cases, an interest not represented in *Rodriguez*, a benefits case where Justice White expressed his view that certiorari should have been granted to resolve the split between the

[15] The Sixth Circuit may not have discussed the split in this case because Whitworth Brothers' complaint had based its claim for recovery of pre-ERISA contributions solely on state law, not ERISA.

broad and narrow views of preemption. *MEBA Pension Trust v. Rodriguez,* No. 89-206, *cert. denied,* 493 U.S. 872, 110 S. Ct. 202, 107 L.Ed.2d 155 (1989); *McMonagle v. Northeast Women's Center,* 493 U.S. 90, 110 S. Ct. 261, 263, 107 L.Ed.2d 210 (1989) (White, dissenting). *See* Section I, E, *infra.*

D. This Court Should Grant Certiorari to Establish That ERISA Provides Jurisdiction To Consider Whether Post-ERISA Actions by Plan Administrators May Be Challenged.

This case demonstrates how participants, employers, and plans all have an interest in the predictability which ERISA was designed to foster and only federal forums can effectively provide. Participants seeking to challenge post-ERISA plan administrator actions desire a federal forum. Employers such as Whitworth Brothers seek the same. Plans, however, also benefit from a rule that ERISA provides jurisdiction for such cases because they benefit from the predictability and certainty that ERISA was designed to foster. Thus, Whitworth Brothers argues that federal courts have jurisdiction to consider its complaint regarding the Pension Fund's denial of a refund of its pre-ERISA contributions, and the Pension Fund agrees. The parties part company, however, on the question of whether a cause of action exists and what the rule of decision should be.

Whitworth Brothers appears to argue at various points that state law should apply (Petition at p. 16, justifying the narrow view of preemption), that federal common law created pursuant ot ERISA should apply (*Id.* at p. 18), and that the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*, should apply (*Id.*).

Central States believes that ERISA provides federal court jurisdiction to consider whether a challenge to an administrator's post-ERISA act may be brought, and that

if a cause of action exists,[16] the question to be resolved is limited to whether the administrator's application of the documents governing the plan may be overturned. *See Firestone, supra,* (standard of review). What a federal court is not empowered to do is review the written provisions themselves under a "reasonableness" standard, since the creation and amendment of an ERISA plan are plan sponsor actions, not plan administrator actions, and ERISA does not permit review of the former. *See* Section I, E, below.

E. This Court Should Grant Certiorari in This Case Because It Presents an Even More Important Split: the Split Concerning Whether, Under ERISA, Courts May Review the Documents Governing Plans for "Reasonableness" (the Issue This Court Invited the Second Circuit To Address on Remand in *Local 144 Nursing Home Pension Fund v. Demisay,* 113 S.Ct. 2252 (1993)).

If this Court agrees that ERISA creates jurisdiction and the rule of decision in this case, it will then reach the issue of even greater importance: whether the plan administrator's post-ERISA decision may be reviewed only for compliance with the documents governing the plan, or whether the provisions in these written documents may themselves be invalidated under a general review for "reasonableness." This issue and its importance is dis-

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[16] A cause of action clearly exists, in Central State's opinion, for a post-ERISA denial of benefits, because such a decision should always involve an application of the plan document to a particular case and 29 U.S.C. § 1132(a)(1)(B) provides that a participant may sue for review of such a decision. *Cf. Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Central States has previously sought certiorari in this case for the Court to consider whether a federal common law cause of action should be created to enable employers to sue to recover contributions mistakenly paid to an ERISA plan. *See Central States v. Whitworth Brothers, cert. denied,* 479 U.S. 1009, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986).

cussed fully in Central States' Cross-Petition. Central States here wishes only to refer the Court to its cross-petition, and to note that the issue is the same issue, but now presented under ERISA, which this Court addressed and resolved under the LMRA in *Local 144 Nursing Home v. Demisay,* —— U.S. ——, 113 S.Ct. 2252 1993). The ERISA issue, in fact, is one which this Court specifically invited (but did not require) the Second Circuit to address on remand in *Demisay.*

II. THE DECISION BY THE COURT BELOW THAT INTEREST IS NOT AVAILABLE ON ANY REFUND MADE PURSUANT TO WHITWORTH BROTHERS' RESTITUTION CLAIM FULLY COMPORTS WITH ERISA'S STATUTORY BAR AND THE OPINIONS OF THE OTHER CIRCUIT COURTS WHICH HAVE ADDRESSED THE ISSUE.

This particular issue neither involves an important question of federal law nor addresses a conflict among the circuits. Indeed, courts which have addressed the issue are unanimous: interest is not available on an employer's common law action for restitution of contributions mistakenly made to an employee benefit fund. *Whitworth II,* Pet. App. at p. 63a; *Kwatcher v. Massachusetts Service Emp. Pension Fund,* 879 F.2d 957, 967 (1st Cir. 1989); *Plucinski v. I.A.M. National Pension Fund,* 875 F.2d 1052, 1058 fn. 6 (3rd Cir. 1989); *Airco Industrial Gases, Inc. v. Teamsters Health and Welfare Pension Fund,* 850 F.2d 1028, 1037 (3rd Cir. 1988); *Dumac Forestry Services, Inc. v. Int. Broth. of Elec. Workers,* 814 F.2d 79, 83 (2d Cir. 1987); *Peckham v. Board of Trustees of International Brotherhood and Allied Trades Union,* 724 F.2d 100, 101 (10th Cir. 1983); *Plumbers and Steamfitters Local 152 v. Bland,* 745 F. Supp. 1172, 1175 (N.D. W.V. 1990).

Furthermore, the clear language of ERISA prevents courts from exercising their equitable powers to award interest on refund claims. *Airco Industrial Gases, Inc.*

v. Teamsters Health and Welfare Pension Fund, 850 F.2d at 1037. The anti-inurement provision of ERISA, 29 U.S.C. § 1103(c)(1), provides that:

> "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

Congress created a few specific exceptions to the bar, including the one at issue in this case:

> "In the case of a contribution . . ., if such contribution . . . is made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph (1) [*the anti-inurement provision*] *shall not prohibit the return of such contribution or payment* to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

29 U.S.C. § 1103(c)(2)(A)(ii) (emphasis added).

Thus, Congress has prohibited plans from paying out any of their assets to employers, and the only exception relevant to the payment of mistaken contributions is the lifting of the prohibition to permit a plan to refund the contributions themselves. Interest, however, is something different from contributions, and thus, as the courts have held, the prohibition remains in place against plans paying out any assets to employers for interest:

> [i]nterest, which is the accrued value of money over time, is not a part of the overpayment but an incident of it. The amount of interest a court might award comes directly from the plan's assets and will deprive participants and beneficiaries of its use . . . The decision to order restitution is an effort at correcting an injustice, but payment of interest means an amount greater than that paid in as excess contributions may be awarded while the fund has encountered certain [administrative] costs related to the

> overpayments. An award of interest, therefore, could cost the fund more than if the excess contribution had never been made.

Airco, 850 F.2d at 1037.

Whitworth Brothers relies on two decisions of this Court in support of its argument that interest should be available as part of its restitution claim on post-ERISA contributions. *U.S. v. Texas*, —— U.S. ——, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) and *Franklin v. Gwinnett County Public Schools*, —— U.S. ——, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). *Franklin* simply held that, in the absence of a clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief in a cause of action brought pursuant to a federal statute. *Franklin*, —— U.S. ——, 112 S.Ct. at 1035. *Franklin* is inapplicable here because Congress has explicitly barred ERISA plans from paying over any of their assets to employers, except for refunds of mistaken contributions themselves.

U.S. v. Texas is also inapposite because it invoked a principle which does not apply where Congress has indicated a contrary purpose, as it has here. *Texas*, —— U.S. ——, 113 S.Ct. at 1634. The principle articulated in the *Texas* case is that prejudgment interest is payable in cases involving debts owed to the United States and arising out of a contract. *Id.* But this common law principle, even if it could be asserted in this case,[17] was expressly noted by this Court to be inapplicable "when a statutory purpose to the contrary is evident." *Id.*, 113 S.Ct. at 1634, *quoting Astoria Federal Savings & Loan v. Solimino*, —— U.S. ——, 111 S.Ct. 2166, 2170, 115 L.Ed.2d 96 (1991).

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[17] The asserted refund obligation of Central States in this case was not based upon a contract; in fact, it would expressly conflict with the refund provision in the Central States Trust Agreement.

Thus, because all of the Circuits which have created a cause of action for an employer to sue for a refund of mistakenly paid contributions have held that interest is not recoverable, and because the holding is not in conflict with any of this Court's decisions, certiorari should be denied as to this issue.

III. THE DECISION OF THE COURT OF APPEALS THAT WHITWORTH BROTHERS' CLAIM FOR A REFUND OF POST-ERISA CONTRIBUTIONS MADE ON BEHALF OF ERNEST WHITWORTH SHOULD BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS CORRECT AND DOES NOT RAISE A QUESTION OF FEDERAL IMPORTANCE SUFFICIENT TO WARRANT THIS COURT'S REVIEW.

The primary reason for denying certiorari on the question of whether the Sixth Circuit correctly upheld the dismissal of the claim for a refund as to Ernest Whitworth's contributions on the basis of a failure to exhaust administrative remedies is that it is a fact-specific issue not significant enough for the Court's review. In addition, however, the Sixth Circuit's decision was correct. Whitworth Brothers could have requested a refund of contributions made on behalf of Ernest Whitworth at (or near) the time it made its request as to William Whitworth, but it elected not to do so. Whitworth Brothers now argues that it would have been futile to exhaust its remedies by making a request for a refund of contributions made on behalf of Ernest prior to initiating this lawsuit because Central States had already denied its request for a refund of contributions made on behalf of William. There is no logic to this argument; the trustees' decision as to William clearly is not *res judicata* as to Ernest (or anyone else for that matter).

Moreover, William Whitworth's initial request to the Pension Fund was for a pension. Only after his pension

request was denied by Central States' trustees did Whitworth Brothers request a refund of the contributions made on William's behalf. (*see* R. 36: Priede Aff., Exhibit H).[18] Had Ernest Whitworth applied for a pension, perhaps the trustees would have found that he was eligible and that the contributions paid on his behalf were not mistakenly paid at all. In sum, Whitworth Brothers cannot argue "futility" since it is not clear that the contributions paid on behalf of Ernest would have presented the same issue as contributions paid on behalf of William.

Whitworth Brothers advances four points in support of its argument: "[1] Central States had already made up its mind, [2] written its arbitrary refund policy, [3] refused to refund mistaken contributions, and [4] continued demanding unlawful contributions [on behalf of Ernest]." (*See* Whitworth Brothers' Petition for Writ of Certiorari at p. 33.) None of these points are meritorious or sufficiently important to warrant this Court's review.

First, Central States' decision was limited to Whitworth Brothers' request for a refund of contributions made on behalf of William, *not* Ernest. Second, Central States' refund provision has not been found to be arbitrary. Third, the trustees' decision denying a refund was, again, limited to Whitworth Brothers' request as to William. Finally, the Sixth Circuit noted that since Central States works on the basis of a self-reporting system, it did not have any basis for discontinuing billings to Whitworth Brothers for contributions on behalf of Ernest just because a refund was denied on William.

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[18] William Whitworth's pension request was denied by the trustees on the basis that William had an ownership interest in Whitworth Brothers, functioned in a management capacity since September 20, 1938, and had been paid as an owner (rather than pursuant to the wage rates set forth in the applicable collective bargaining agreements). (R. 36: Priede Aff., Exhibits G and H).

In light of ERISA's mandate that benefit plans include an appeals procedure,[19] the courts have consistently required that claimants exhaust these administrative procedures prior to bringing litigation seeking benefits. *Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir. 1991); *Makar v. Health Care Corp. of Mid-Atlantic (Care First)*, 872 F.2d 80, 82 (4th Cir. 1989); *Mason v. Continental Group Incorporated*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3rd Cir. 1984); *Kross v. Western Electric Company, Inc.*, 701 F.2d 1238 (7th Cir. 1983); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980). Failure to exhaust these remedies is grounds for an award of summary judgment. *Merritt v. Confederation Life Insurance Company*, 881 F.2d 1034 (11th Cir. 1989).

In sum, the court of appeals correctly ruled on summary judgment that Whitworth Brothers' claim for a refund of contributions made on behalf of Ernest Whitworth should be dismissed for failure to exhaust administrative remedies. Furthermore, this issue does not involve a question of national importance and, therefore, does not warrant the court's review.

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[19] 29 U.S.C. § 1133 provides:

> Claims Procedure:
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> In accordance with regulations of the Secretary, every employee benefit plan shall—
>
> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

IV. BECAUSE THE COURT OF APPEALS' REFERENCE TO THREE INFORMATIONAL FACTS NEITHER PREJUDICED NOR AFFECTED THE SUBSTANTIAL RIGHTS OF WHITWORTH BROTHERS THERE EXISTS NO BASIS FOR DISTURBING THE DECISIONS BELOW. THIS ISSUE IS NOT IMPORTANT ENOUGH TO WARRANT THIS COURTS REVIEW.

The primary reason to deny certiorari on the question of whether the Sixth Circuit's reference to certain background facts was erroneous is the lack of significance of this issue beyond this case. In addition, however, the Sixth Circuit's reference was appropriate and, even if erroneous, harmless. Whitworth Brothers would have this Court believe that it was prejudiced because the court of appeals took judicial notice at oral argument of three informational facts.[20] Since none of these snip-

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[20] Whitworth Brothers argues the Court inappropriately utilized the following:

1. Central States is under a "self-reporting system" in which employer is responsible for notifying the fund of a change in employee status, [Whitworth Brothers] Appendix pages 12a-13a; contra page 5a (role of local union);
2. Employers contributed on behalf of "391,000 employee participants between 1964-1981; [Whitworth Brothers' Appendix page 59a];
3. It is "administratively impossible" to audit so many employers, [Whitworth Brothers' Appendix page 58a-59a].

(*See* Whitworth Brothers' Petition for a Writ of Certiorari at pp. 36-37.) It is noteworthy that these facts—none of which Whitworth Brothers ever asserted were incorrect—came to the Sixth Circuit's attention through Central States' Motion to Strike or, in the alternative, to Supplement the record on Appeal, filed in response to Whitworth Brothers' appellate brief which included numerous unsupported factual assertions. Although the Sixth Circuit denied Central States' Motion, its opinion recites some of Whitworth Brothers' non-record assertions (e.g., Whitworth Brothers purported contribution history on behalf of other individuals, Pet. App. at p. 5a-6a, n.3) as well as some points raised by Central States' Motion. Apparently the Sixth Circuit exercised discretion

pets of information to which the court alluded go to the merits of Whitworth Brothers' claim against Central States they are immaterial and non-esesntial. It cannot be clearer in reading the court's opinion that it merely referenced these facts to clarify the way Central States operates. It is hornbook law that courts have judicially noticed a great variety of facts about the practice of businesses. *See* Wright & Miller, *Federal Practice and Procedure*, Civil § 2410 n.28 (1971) and the numerous cases cited therein. That is all the court of appeals did. Moreover, there is no prejudice to Whitworth Brothers.

Whitworth Brothers erroneously asserts that the court of appeals "*affirmed* the judgment . . . on the basis of this non-record evidence." (*See* Whitworth Brothers' Petition for a Writ of Certiorari at p. 36) (emphasis added). This is clearly wrong. There is no indication in the court of appeals' decision that it affirmed judgment in favor of Central States based solely on any of these facts.

Even if the court's casual reference to these facts amounted to error (which it does not), such error is harmless. Rule 61 of the Federal Rules of Civil Procedure, which is equally applicable to appellate courts, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984); *Gillis v Keystone Mutual Casualty Co.*, 172 F.2d 826 (6th Cir.), *cert. denied*, 338 U.S. 822, 70 S.Ct. 67, 94 L.Ed. 499 (1949), provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment

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in sifting through all these facts before using any of them for clearly background and informational purposes, and *not* in support of its legal opinion.

> or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In addition, the harmless-error statute, 28 U.S.C. § 2111, which applies directly to appellate courts, incorporates the same principles as found in Rule 61; it provides:

> On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

At the heart of 28 U.S.C. § 2111 and Rule 61 is the proposition that the critical consideration is not the occurrence of the error, but its seriousness. *See e.g., Benna v. Reeder Flying Service, Inc.*, 578 F.2d 269, 271 (9th Cir. 1978) (Rule 61 directs courts to "disregard error which does not affect the substantial rights of the parties"). The litmus test is whether the party claiming error was thereby unjustly prejudiced. *U.S.* v. *Lane Motor Co.*, 199 F.2d 495 (10th Cir. 1952), *aff'd*, 344 U.S. 630, 73 S.Ct. 459, 97 L.Ed. 622 (1953); *Asbill v. Housing Authority of the Choctaw Nation of Oklahoma*, 726 F.2d 1499 (10th Cir. 1984) (applying both the statute and Rule 61). Whitworth Brothers has not given any specifics as to how it may have been prejudiced because, in fact, it was not. The background facts in question were not even asserted by Whitworth Brothers to be incorrect. Thus, even assuming, *arguendo*, there was error, the court's decision could not be disturbed because Whitworth Brothers was not prejudiced thereby.

There being no prejudice or error, there is no issue for this Court to decide.

CONCLUSION

For the foregoing reasons, Respondents submit that the petition for a writ of certiorari should be granted as to the first "Question Presented" by Petitioner as restated by Central States on p. i of this brief, but that the petition should be denied as to the remaining issues.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY PROVISIONS

Section 403 of ERISA, 29 U.S.C. § 1103

* * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

> (ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

* * * *

Section 514 of ERISA, 29 U.S.C. § 1144

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of

this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

* * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of

either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

* * * *